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13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

17 HOOPA VALLEY TRIBE,) Civ. No. 16-CV-04294-WHO
18)
19 Plaintiff,)
20) SECOND AMENDED COMPLAINT
21 v.) FOR DECLARATORY AND
22) INJUNCTIVE RELIEF
23 U.S. BUREAU OF RECLAMATION)
24) Endangered Species Act and
25) Administrative Procedure Act Case
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1 **INTRODUCTION**

2 1. In this action for declaratory and injunctive relief, Plaintiff Hoopa Valley Tribe
3 (“Tribe”) challenges the actions of the United States Bureau of Reclamation (“BOR”) and the
4 National Marine Fisheries Service (“NMFS”) for violating the Endangered Species Act (“ESA”),
5 16 U.S.C. §§ 1531 *et seq.*, in operating the Klamath Irrigation Project (“Klamath Project”).
6 Specifically, the Tribe seeks an order declaring that NMFS and BOR have illegally failed to
7 reinstate formal consultation pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, and 50 C.F.R.
8 § 402.16 regarding the effects of Project operations on Southern Oregon/Northern California
9 Coast Coho (“SONCC”) salmon, which are listed as threatened under the ESA, and an order
10 enjoining them to do so. The Tribe further seeks an order declaring that BOR’s continued
11 operation of the Klamath Project has caused excessive take of SONCC Coho salmon and has
12 failed to insure that operation of the Klamath Project is not likely to jeopardize the continued
13 existence of SONCC Coho salmon, resulting in violations of Sections 7 and 9 of the ESA. The
14 Tribe also seeks an order enjoining any prospective operation of the Klamath Project that could
15 further take SONCC Coho salmon pending completion of the re-initiated consultation.

16 2. The Secretary of the Interior, acting through the BOR, manages and operates the
17 Klamath Project, which diverts water from the Klamath River to supply irrigation water to
18 agricultural lands. BOR controls diversion and releases of water from Upper Klamath Lake,
19 which in turn substantially affect flow levels in the Klamath River downstream of Iron Gate dam.
20 BOR identifies timely volumes of water flows at Iron Gate Dam that are available for Chinook,
21 Coho, and other salmon habitat after BOR has estimated the water supply needs throughout the
22 year of the Klamath Project for irrigation purposes.

23 3. BOR’s operation of the Klamath Project is subject to and must comply with the
24 ESA. In addition, BOR owes a fiduciary trust responsibility to the Tribe, which holds federal
25 reserved rights to fish and water in the Klamath River.
26

1 4. On May 31, 2013, NMFS and the United States Fish and Wildlife Service
2 (“USFWS”) issued “Biological Opinions on the Effects of Proposed Klamath Project Operations
3 from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and
4 Endangered Species” (the “2013 BiOp”). The 2013 BiOp addresses effects of proposed Klamath
5 Project operations on SONCC Coho salmon. The 2013 BiOp is accompanied by an Incidental
6 Take Statement (“ITS”) that establishes the permissible amount or extent of “take” of SONCC
7 Coho.

8 5. The 2013 BiOp acknowledges that Klamath Project operations exacerbate the
9 impact and severity of a lethal fish disease known as *Ceratonova shasta* (formerly *Ceratomyxa*
10 *Shasta*) (“*C.shasta*”) on juvenile salmonids due to the reduction of magnitude, frequency, and
11 duration of flows in the mainstem Klamath River.

12 6. A critical assumption, as well as a limit for the annual incidental take of SONCC
13 Coho in the 2013 BiOp and ITS, is that approximately 50% of the total annual Chinook salmon
14 juveniles in the mainstem Klamath River between the Shasta River and the Trinity River will not
15 be infected with *C.shasta* during the months of May to July. 2013 BiOp at 392. Due to the
16 small population size and limited sampling data for SONCC Coho, NMFS used infection rates
17 for Chinook salmon as a surrogate for infection rates and incidental take of SONCC Coho
18 salmon. The 2013 BiOp states that “[i]f the percent of *C. Shasta* infections for Chinook salmon
19 juveniles in the mainstem Klamath River between Shasta River and Trinity River during May to
20 July exceed these levels (i.e., 54 percent infection via histology or 49 percent infection via
21 QPCR), reinitiation of formal consultation will be necessary.” *Id.* at 391. The 2013 BiOp relies
22 on not violating this required limit for incidental take to conclude that continued operations of
23 the Klamath Project will not jeopardize SONCC Coho or adversely modify its critical habitat.

24 7. In 2014, the average juvenile Chinook salmon *C.shasta* infection rate in the
25 Klamath River upstream of the Trinity River confluence from May through July was estimated at
26 81%. In 2015, the average juvenile Chinook salmon *C.shasta* infection rate in the same part of

1 the river was estimated at 91%. These infection rates greatly exceed the permissible rates in the
2 2013 BiOp and ITS. The rates of infection, and subsequent death of salmon, were caused by
3 factors including low stream flows.

4 8. Despite the significant exceedance of *C. Shasta* infection rates and the occurrence
5 of multi-year drought and hydrologic conditions and resulting operational changes that were not
6 anticipated in the 2013 BiOp, BOR and NMFS have failed to reinitiate consultation as required
7 by the 2013 BiOp, by Section 7 of the ESA, and by 50 CFR § 402.16. Without reinitiation of
8 formal consultation, BOR has continued to operate the Project under the terms and conditions of
9 the 2013 BiOp and the ITS in a manner that results in excessive incidental take of SONCC Coho.

10 9. This action seeks to require NMFS and BOR to reinitiate formal consultation
11 pursuant to the ESA and to invalidate the 2013 BiOp and its Incidental Take Statement (“ITS”)
12 for two principal reasons. The ESA and its implementing regulations at 50 CFR § 402.16 require
13 re-initiation of formal consultation: (a) if the amount of taking specified in the ITS is exceeded;
14 or (b) if new information reveals effects of the action to an extent not previously considered.
15 Despite fulfillment of these conditions, and despite the express terms of the BiOp requiring re-
16 initiation of consultation under the present circumstances, NMFS and BOR have failed and
17 refused to reinitiate formal consultation.

18 10. This action seeks a declaration that NMFS and BOR have violated the ESA by
19 failing to reinitiate consultation and unlawfully taking SONCC Coho through Klamath Project
20 operations. The 2013 BiOp and ITS have clearly failed to protect SONCC Coho and its habitat
21 from excessive take and have failed to insure that Project operations are not likely to jeopardize
22 the continued existence of SONCC Coho

23 11. This action also seeks an injunction directing NMFS to withdraw the 2013 BiOp
24 and ITS, directing BOR and NMFS to reinitiate and complete a new formal consultation on a
25 schedule set by the Court, and for BOR to operate the Klamath Project in a manner which
26 preserves and protects SONCC Coho salmon pending completion of consultation in accordance

1 with the best available science. This relief is necessary to preserve the status quo, to correct
2 illegal final agency action, to prevent future unlawful agency actions that may cause additional
3 irreparable harm to the environment and species listed for protection under the ESA, and to
4 protect tribal trust resources.

5 12. This action also seeks an injunction preventing BOR from relying on the 2013
6 BiOp and ITS to satisfy ESA obligations, and an injunction requiring BOR to limit irrigation
7 water deliveries to the Klamath Project that would cause Klamath River flows below Iron Gate
8 Dam to fall below the levels necessary for survival and recovery of SONCC Coho as determined
9 by the best available science or result in excessive incidental take in the period before a new
10 legally and biologically valid Biological Opinion is issued.

11 13. Finally, this action seeks an order requiring BOR and NMFS to initiate and
12 complete consultation on the effects of the Klamath Project on Essential Fish Habitat for
13 Chinook salmon and other species pursuant to the Magnuson-Stevens Fishery Conservation and
14 Management Act (“MSFCMA”), 16 U.S.C. §§ 1855(b)(2) and 1855(b)(4).

15 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

16 14. This action is brought pursuant to the ESA, 16 U.S.C. § 1540(g)(1) and the APA,
17 5 U.S.C. §§ 704, 706. This Court has jurisdiction pursuant to 5 U.S.C. §§ 704, 706, 28 U.S.C.
18 § 1331, 28 U.S.C. § 1362, 16 U.S.C. § 1540(g)(1), 16 U.S.C. § 1855 and 16 U.S.C. § 1861.

19 15. The Tribe provided NMFS and BOR with notice of intent to sue for violations of
20 the ESA, pursuant to 16 U.S.C. § 1540(g) on May 17, 2016. NMFS and BOR have failed to
21 correct or remedy their violations of the ESA.

22 16. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C.
23 § 1540(g)(3), as the Tribe resides in this district and many of the events, omissions, and
24 consequences of Defendants’ violations of the law giving rise to the claims occurred or will
25 occur in this district.

1 17. Intradistrict Assignment: this case is properly assigned to the San Francisco
2 Division under Civil L.R. 3-2(c) because a substantial part of the events or omissions which give
3 rise to this action occurred in Humboldt and Del Norte counties, counties through which the
4 lower Klamath River flows, because the Tribe and its Reservation are located in Humboldt
5 County, and because the location of the fish disease is in Humboldt and Del Norte Counties.

6 **PARTIES**

7 18. Plaintiff Hoopa Valley Tribe is a federally-recognized Indian tribe. Since time
8 immemorial, the Tribe and its members have used, and continue to use, the Klamath-Trinity
9 River system and its anadromous fishery resource for subsistence, cultural, ceremonial, religious,
10 and commercial purposes. The lower twelve miles of the Trinity River and a stretch of the
11 Klamath River flows through the Hoopa Valley Reservation. All migrating salmon from the
12 Trinity River must use the mainstem of the Klamath River as their corridor to and from the sea.
13 The Tribe’s members’ past, present, and future enjoyment of the benefits provided by the
14 Klamath-Trinity River system has been, is being, and will continue to be injured by defendants’
15 on-going disregard of their statutory duties and by the injuries caused by the unlawful operation
16 of the Klamath Project and the resulting impacts to anadromous fish, including SONCC Coho.

17 19. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers
18 have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was “not
19 much less necessary to the existence of the Indians than the atmosphere they breathed.” *Blake v.*
20 *Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381
21 (1905)). The salmon fishery also holds significant commercial and economic value in the Hoopa
22 culture and economies, and the Tribe holds property rights in the Klamath River Basin fishery.
23 The lower twelve miles of the Trinity River and a stretch of the Klamath River near the
24 confluence with the Trinity River flow through the Hoopa Valley Reservation. *See*
25 Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of
26 the Interior 3-4 (Oct. 4, 1993) (hereinafter 1993 Solicitor Opinion).

1 20. The principal purpose of the Tribe’s Reservation was to set aside sufficient
2 resources of these rivers for the Indians to be self-sufficient and achieve a moderate living based
3 on fish. See 1993 Solicitor Opinion 3, 15, 18-21, *cited with approval*, *Parravano v. Babbitt*,
4 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The Tribe’s federal
5 reserved fishing right carries with it a corresponding right to Klamath and Trinity River flow
6 levels that are sufficient to support a productive habitat for the Tribe’s anadromous fishery,
7 including but not limited to Coho and Chinook salmon.

8 21. Defendants in this action are:

9 A. United States Bureau of Reclamation (“BOR”), an agency of the United
10 States Department of the Interior, constructs and operates federal water projects throughout the
11 United States. BOR has primary management authority over the Klamath Project, the operation
12 of which is at the heart of this action, and has a trust responsibility to ensure a continued fishery
13 for the Tribe.

14 B. National Marine Fisheries Service (“NMFS”) is an agency of the United
15 States Department of Commerce responsible for administering the provisions of the Endangered
16 Species Act with regard to threatened and endangered marine species, including the species of
17 threatened Coho salmon that live in the Klamath River basin. Both BOR and NMFS are
18 obligated by federal law to protect the Tribe’s fishing rights in the Klamath-Trinity River system
19 and each have a trust responsibility to ensure a continued fishery for the Tribe.

20 **NATURE AND BACKGROUND OF CASE**

21 A. The Klamath River’s Imperiled Ecosystem

22 22. Habitat critical for the survival of the Coho salmon is located in the lower-
23 Klamath River and within the Hoopa Valley Reservation on the Tribe’s former ancestral lands in
24 the southern part of the Klamath Basin. For more than 100 years the Hoopa Valley Reservation
25 has encompassed much of the Klamath and Trinity Rivers. In 1988, Congress partitioned the
26 Hoopa Valley Reservation, reserving to the Hoopa Valley Tribe the portion of the reservation

1 extending six miles to either side of the Trinity River and part of the Klamath River, near the
2 confluence with the Trinity River. Several species of anadromous fish inhabit the Klamath-
3 Trinity River system and its tributaries, including Chinook, Coho, steelhead, green sturgeon,
4 Pacific lamprey, and coastal cutthroat trout. Klamath River runs of salmon and steelhead at one
5 time were among the region's mightiest. SONCC Coho salmon, a population that includes
6 Klamath and Trinity River Coho, was estimated in 1940 to range between 150,000 and 400,000
7 naturally spawning fish annually. *See* Threatened Status for SONCC ESU of Coho Salmon, 62
8 Fed. Reg. 24588, 24588 (May 6, 1997) ("Listing Notice").

9 23. A multitude of factors, including habitat destruction, and hydropower
10 development contributed to drastic declines of all stocks of salmonids in recent decades. In
11 1997, NMFS concluded that "Coho populations in this ESU are very depressed, currently
12 numbering approximately 10,000 naturally produced adults." *Id.*

13 The perilous situation of the SONCC Coho salmon prompted
14 NMFS in 1997 to list the fish under the ESA as threatened. In
15 listing the Coho, NMFS noted that "water diversions" and "water
16 withdrawals" for irrigation were "major activities responsible for
17 the decline of Coho salmon in Oregon and California." *Id.* at
18 24,592. NMFS further concluded that depletion and storage of
19 natural flows have drastically altered natural hydrological cycles,
20 especially in California and southern Oregon rivers and streams.
21 Alteration of streamflows has increased juvenile salmonid
22 mortality for a variety of reasons: Migration delay resulting from
23 insufficient flows or habitat blockages; loss of usable habitat due to
24 dewatering and blockage; stranding of fish resulting from rapid
25 flow fluctuations; entrainment of juveniles into unscreened or
26 poorly screened diversions; and increased juvenile mortality
27 resulting from increased water temperatures. In addition, reduced
28 flows degrade or diminish fish habitats via increased deposition of
29 fine sediments in spawning gravels, decreased recruitment of new
30 spawning gravels, and encroachment of riparian and non-endemic
31 vegetations into spawning and rearing areas.

32 *Id.* at 24,593. Klamath River basin steelhead, part of the Klamath Mountains Province steelhead
33 ESU, remain a candidate species for listing under the ESA due to high risk factors. 63 Fed. Reg.

1 13347 (Mar. 19, 1998). Klamath River basin Chinook suffer the same ill effects from Klamath
2 Project water withdrawals.

3 24. In originally designating critical habitat for the SONCC Coho salmon, NMFS
4 noted that “essential features” of Coho habitat include water quantity, water velocity, and water
5 temperature. *See* Designated Critical Habitat: Central California Coast and Southern
6 Oregon/Northern California Coast Coho Salmon, 64 Fed. Reg. 24,049, 25,059 (May 5, 1999).
7 NMFS further concluded that irrigation water withdrawals and dam operations were “activities
8 that may require special management considerations” for juvenile Coho salmon. *Id.* at 24,059.
9 Chinook salmon require the same habitat characteristics, and water withdrawals and dam
10 operations also affect Chinook salmon habitat and populations.

11 25. Concerned with continued drastic drops in salmon populations in the Klamath and
12 Trinity Rivers, Congress in 1984 enacted the Trinity River Basin Fish and Wildlife Management
13 Act of 1984, Pub. L. 98-541, noting the decreased flows in the Trinity River caused by BOR’s
14 operations and directing the Secretary of the Interior to develop a management program for the
15 river to restore fish levels. Subsequently in 1986, Congress enacted the Klamath Basin Fishery
16 Resources Restoration Act (“Klamath Restoration Act”), 16 U.S.C. § 460ss. Among various
17 causes of the declines in salmon, Congress cited “the construction and operations of dams,
18 diversions, and hydroelectric projects” which have contributed to, among other things, “reduced
19 flows . . . which ha[ve] significantly reduced the anadromous fish habitat in the Klamath-Trinity
20 River system.” 16 U.S.C. § 460ss(3).

21 B. BOR’s Management of Water in the Klamath Basin

22 26. Congress authorized construction and development of the Klamath Project in
23 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the
24 Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* Various project facilities were built between
25 1906 and 1966. The Klamath Project consists of several major dams, including Link River Dam,
26 Clear Lake Dam, and Gerber Dam, as well as various canals and pumping stations. BOR’s

1 project operations determine the level, timing, and rate of water flow in the Klamath River below
2 Iron Gate Dam.

3 27. The Klamath Project provides irrigation water to approximately 200,000 acres of
4 agricultural land each year. The Klamath Project also supplies water for a system of wildlife
5 refuges operated by the U.S. Fish and Wildlife Service (“FWS”). Four national wildlife refuges
6 – Lower Klamath, Tule Lake, Clear Lake, and Upper Klamath – lie within the boundaries of the
7 project.

8 28. Pursuant to a 1956 contract with BOR, PacifiCorp, a private corporation, operates
9 the Klamath Project’s Link River Dam. PacifiCorp also owns and operates several downstream
10 dams on the Klamath River for hydroelectric power generation, including the Iron Gate Dam in
11 Northern California. These projects are operated pursuant to a Federal Energy Regulatory
12 Commission (“FERC”) license that sets certain minimum instream flows at Iron Gate Dam.

13 29. Operation of the Klamath Project has a major impact on flows in the Klamath
14 River downstream of Iron Gate Dam and on anadromous fish habitat in both the Klamath and
15 Trinity Rivers.

16 30. BOR maintains ongoing discretionary management authority and control over the
17 Klamath Project. Since 1996, BOR has operated the Klamath Project with annual operating
18 plans that designate or identify minimum flow levels in the Klamath River downstream of Iron
19 Gate Dam. These plans identify flows that are likely to be met – after agricultural diversions are
20 satisfied – during particular times of the year in terms of the cubic feet per second (“cfs”) of
21 water as measured flowing past Iron Gate Dam. BOR’s 2016 Annual Operations Plan calculates
22 that 388,680 acre-feet of water will be supplied to the Klamath Project, water that would
23 otherwise flow down the Klamath River.

24 31. BOR’s diversions of water occur upstream of the portion of the Klamath River in
25 which fish disease is most prevalent. BOR’s actions result in hydrologic concentrations of
26

1 *C.shasta* actinospores that increase the percentage of disease-related mortality to Coho salmon in
2 the mainstem Klamath River.

3
4 C. Endangered Species Act Consultation

5 32. The ESA grants the right to any person to bring suit “to enjoin any person,
6 including the United States and any other governmental instrumentality or agency . . . who is
7 alleged to be in violation of any provision of [the ESA] or regulation issued under the authority
8 thereof.” 16 U.S.C. § 1540(g)(1)(A). The District Courts have jurisdiction “to enforce any such
9 provision or regulation, or to order the Secretary to perform such act or duty, as the case may
10 be.” 16 U.S.C. § 1540(g).

11 33. The Administrative Procedure Act (“APA”) authorizes courts reviewing agency
12 action to hold unlawful and set aside final agency action, findings, and conclusions that are
13 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
14 5 U.S.C. § 706(2)(A).

15 34. Section 7 of the ESA prohibits agency actions that may jeopardize the survival
16 and recovery of a listed species or adversely modify its critical habitat:

17 [e]ach federal agency shall, in consultation with and with the
18 assistance of the Secretary, insure that any action authorized,
19 funded, or carried out by such agency (hereinafter in this section
20 referred to as an “agency action”) is not likely to jeopardize the
21 continued existence of any endangered species or threatened
22 species or result in the destruction or adverse modification of
23 habitat of such species which is determined by the Secretary . . .
24 to be critical. . . .

25 16 U.S.C. § 1536(a)(2).

26 35. Section 9 of the ESA prohibits “take” of listed species by anyone, including
federal agencies. 16 U.S.C. § 1538. “Take” means to “harass, harm, pursue, hunt, shoot, wound,
kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include
“significant habitat modification or degradation which actually kills or injures fish or wildlife by

1 significantly impairing essential behavioral patterns, including breeding, spawning, rearing,
2 migrating, feeding or sheltering.” 50 C.F.R. § 222.102. “Take” by federal agencies is permitted
3 only if the agency receives an Incidental Take Statement (“ITS”) pursuant to Section 7(b)(4),
4 upon completion of formal consultation. 16 U.S.C. § 1536(b)(4). If an ITS is issued, any take
5 that occurs must be within the limits set in the ITS.

6 36. As part of any ITS, NMFS must specify “the impact of such incidental taking
7 on the species” - quantifying by amount or extent the allowed incidental take. 16 U.S.C.
8 § 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS’ required
9 finding that an incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4), and it
10 provides a check on the adequacy of NMFS’ “reasonable and prudent measures . . . necessary or
11 appropriate to minimize such impact.” 16 U.S.C. § 1536(b)(4)(C)(ii).

12 37. Section 7 of the Act also establishes an interagency consultation process to assist
13 federal agencies in complying with their duty to avoid jeopardy to listed species, or destruction
14 or adverse modification of critical habitat. Under this process, a federal agency proposing an
15 action that “may affect” a listed species, including salmon and steelhead, must prepare and
16 provide to the appropriate expert agency, here NMFS, a “biological assessment” of the effects of
17 the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

18 38. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
19 initiates consultation on an action under ESA § 7(a)(2), it “shall not make any irreversible or
20 irretrievable commitment of resources with respect to the agency action which has the effect of
21 foreclosing the formulation or implementation of any reasonable and prudent alternative
22 measures which would not violate subsection (a)(2) of this section.” The purpose of ESA § 7(d)
23 is to maintain the status quo pending the completion of interagency consultation.

24 39. For those actions that may adversely affect a species, NMFS must review all
25 information provided by the action agency in the biological assessment, as well as any other
26 relevant information, to determine whether the proposed action is likely to jeopardize a listed

1 species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3).
2 This determination is set forth in a biological opinion from NMFS. *Id.*; 16 U.S.C.
3 § 1536(b)(3)(A).

4 40. In formulating its biological opinion, NMFS must evaluate the “effects of the
5 action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
6 This multi-step analysis requires NMFS to consider:

7 a. the direct, indirect, interrelated, and interdependent effects of the proposed
8 action, 50 C.F.R. § 402.02;

9 b. the “environmental baseline” to which the proposed action will be added.
10 This baseline includes “all past and present impacts of all Federal, State, or private actions and
11 other human activities in the action area; the anticipated impacts of all proposed Federal projects
12 in the action area that have already undergone formal or early section 7 consultation; and the
13 impact of State or private actions which are contemporaneous with the consultation in progress,”
14 50 C.F.R. § 402.02; and,

15 c. any “future State or private activities, not involving Federal activities, that
16 are reasonably certain to occur within the action area of the Federal action subject to
17 consultation,” 50 C.F.R. § 402.02.

18 41. The regulations do not, however, permit NMFS to consider the effects of future
19 federal actions when determining whether a proposed federal action will jeopardize a listed
20 species. *Id.*; *see also* 51 Fed. Reg. 19933 (June 3, 1986) (Interagency Cooperation – Endangered
21 Species Act of 1973, as Amended; Final Rule) (“Since all future Federal actions will at some
22 point be subject to the section 7 consultation process pursuant to these regulations, their effects
23 on a particular species will be considered at that time and will not be included in the cumulative
24 effects analysis.”). Such future federal actions also are not properly a part of the environmental
25 baseline, given that they have not yet occurred.

1 42. After issuance of a Biological Opinion, NMFS and the agency with discretionary
2 federal involvement or control over the action must reinitiate formal consultation in certain
3 circumstances. 50 CFR § 402.16. For example, reinitiation must be requested if (a) the amount
4 or extent of taking specified in the ITS is exceeded; or (b) new information reveals effects of the
5 action that may affect listed species or critical habitat in a manner or to an extent not previously
6 considered.

7 D. MSFCMA Consultation

8 43. The MSFCMA requires a three-step consultation process between the acting
9 agency, the BOR, and NMFS regarding effects on Essential Fish Habitat. First, the acting
10 agency “shall consult with the Secretary [NMFS] with respect to any action authorized, funded
11 or undertaken or proposed . . . that may adversely affect any essential fish habitat.” Then, the
12 Secretary shall “recommend to such agency measures that can be taken by such agency to
13 conserve such habitat.” Finally, the action agency “shall provide a detailed response in writing .
14 . . [which] include[s] a description of measures proposed by the agency for avoiding, mitigating,
15 or offsetting the impact of the activity on such habitat.”

16 44. Essential Fish Habitat has been designated. 79 Fed. Reg. 75449 (Dec. 18, 2014).
17 The Klamath River is included in the Essential Fish Habitat of salmon.

18 E. BOR’s Past Consultation Efforts

19 45. In 1999, BOR consulted with NMFS regarding the impacts of the 1999 Klamath
20 Operations Plan on listed Coho salmon under Section 7(a)(2) of the ESA. In 1999, NMFS issued
21 a Biological Opinion (“1999 BiOp”) that found that operation of the Klamath Project, and its
22 associated water diversions, withdrawals, temperature impacts, and pollutant loadings would
23 adversely affect listed Coho salmon. The 1999 BiOp describes how inadequate flows and
24 sudden changes in flow level result in stranding of anadromous fish and the destruction of usable
25 habitat. The 1999 BiOp concludes that higher flows in the Klamath River are associated with
26

1 increased juvenile salmon survival. Nevertheless, in the 1999 BiOp, NMFS found that the
2 Klamath Project was not likely to jeopardize SONCC Coho.

3 46. In 2000, BOR's Klamath Operation Plan again specified minimum flow levels
4 that varied on a monthly or bi-weekly basis, but BOR never completed the requisite ESA
5 consultation. BOR's failure to follow the law led this Court to rule that "[d]espite the weight
6 which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is
7 clear that the Bureau of Reclamation failed to comply with these requirements before
8 implementing its 2000 Operations Plan for the Klamath Project." *Pacific Coast Fed'n of*
9 *Fishermen's Ass'ns v. United States Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1242-43
10 (N.D. Cal. 2001).

11 47. On May 31, 2002, NMFS issued its Biological Opinion: Klamath Project
12 Operations, June 1, 2002 - March 31, 2012 ("2002 BiOp"). NMFS found the proposed operation
13 of the Klamath Project is likely to jeopardize the continued existence of SONCC Coho and
14 adversely modify its designated critical habitat.

15 48. After finding jeopardy, NMFS identified and described the RPA to the proposed
16 action that it believed would avoid jeopardy and adverse modification. 16 U.S.C.
17 § 1536(b)(3)(B).

18 49. The 2002 BiOp and RPA have five major components, including: specific water
19 management measures over the ten-year period; a water bank and water supply enhancement
20 program for flows in the Klamath River below Iron Gate dam; a long-term flow target; an inter-
21 governmental task force; and an inter-governmental research science panel.

22 50. In its ITS for the 2002 BiOp and RPA, NMFS found that "some level of
23 incidental take [is] to occur due to implementation of some of the actions outlined in the
24 reasonable and prudent alternative." 2002 BiOp at 71. However, NMFS failed to quantify,
25 either numerically or by extent, the incidental take permitted under the 2002 BiOp. Moreover,
26

1 NMFS failed to evaluate whether this unspecified level of take, combined with already-permitted
2 levels of take for SONCC Coho, would jeopardize the continued existence of the species.

3 51. Plaintiff Hoopa Valley Tribe, the Pacific Coast Federation of Fishermen's
4 Associations and others filed suit challenging the 2002 BiOp in related case *PCFFA, et al v.*
5 *U.S. Bureau of Reclamation*, No. C 02-2006 (N.D. Cal.). On July 15, 2003, this Court granted
6 Plaintiffs' Motion for Summary Judgment, in part, concluding that the RPA and ITS in NMFS'
7 2002 BiOp were arbitrary and capricious.

8 52. The United States Court of Appeals for the Ninth Circuit agreed that the short-
9 term measures in the 2002 BiOp were arbitrary and capricious. *PCFFA v. U.S. Bureau of*
10 *Reclamation*, 426 F.3d 1082 (9th Cir. 2005). The Ninth Circuit also ruled that the 2002 BiOp's
11 phased increases in water flows meant that five full generations of SONCC Coho would
12 complete their three-year life cycles during years of insufficient water. The Court stated: "If
13 that happens, all the water in the world in 2010 and 2011 will not protect the Coho, for there will
14 be none to protect." *Id.* at 1094.

15 53. On remand, the District Court directed NMFS and BOR to reinitiate consultation;
16 NMFS to issue a new Biological Opinion; and BOR to limit project irrigation deliveries if they
17 would cause flows in the Klamath River to fall below 100% of the Phase III flow levels
18 identified by NMFS in its 2002 BiOp.

19 54. In 2007, BOR reinitiated consultation but, after NMFS issued a draft jeopardy
20 BiOp, BOR requested that NMFS suspend the completion of the consultation. On March 18,
21 2010, NMFS issued its BiOp for the period 2010 – 2018 concluding that Reclamation's proposed
22 operations would likely jeopardize the continued existence of SONCC Coho salmon.

23 55. The 2010 BiOp caused BOR to again reinitiate consultation. In 2013, NMFS
24 revised its proposed action to increase the minimum daily flow targets for April, May and June,
25 as well as other changes.

1 56. On May 31, 2013, NMFS (together with FWS) issued the 2013 BiOp. NMFS
2 concluded that the action, as proposed, is not likely to jeopardize the continued existence of the
3 SONCC Coho. However, NMFS stated that it expected incidental take of SONCC Coho and
4 other species.

5 57. Among the anticipated forms of incidental take is BOR's creation of conditions
6 promoting the spread of fish diseases such as *C.shasta*. The 2013 BiOp states: "If the percent of
7 *C.shasta* infections for Chinook salmon juveniles in the mainstem Klamath River between
8 Shasta River and Trinity River during May to July exceed these levels (i.e., 54% infection via
9 histology or 49% infection via QPCR), re-initiation of formal consultation will be necessary."
10 2013 BiOp at 391.

11 58. BOR maintains continuing discretionary authority and control of the Klamath
12 Project subject to federal laws including the ESA.

13 59. On July 17, 2015, BOR contacted NMFS concerning the previous two years of
14 implementing the proposed action under the 2013 BiOp. The subject line of the July 17, 2015
15 letter read "Notification of Modification, Amendment, Clarification and/or Reinitiation of
16 Formal Consultation on Klamath Project Operations." BOR did not request or commence
17 reinitiation of formal consultation with NMFS regarding SONCC Coho in the July 17, 2015
18 letter or in any other communication. BOR did note in the letter that "one of [the] outstanding
19 issues is completion of the Essential Fish Habitat and Orca consultation." *See* Exhibit 1.

20 60. On March 29, 2016, NMFS responded to BOR and announced a determination
21 that the Chinook salmon infection rates used in the ITS were exceeded in 2014 and 2015. NMFS
22 stated: "We conclude that the effects analysis and conclusions in the 2013 BiOp remain valid.
23 However, based on new information described below, we intend to revise the ITS prior to the
24 2017 operational water year, commencing April 1, 2017." *See* Exhibit 2. NMFS did not request
25 or commence reinitiation of formal consultation with BOR regarding SONCC Coho at any time
26 following the exceedances in 2014 and 2015 of the taking specified in the ITS.

1 61. NMFS and BOR have each failed to reinitiate or commence formal ESA
2 consultation despite the occurrence of conditions that require such reinitiation of formal ESA
3 consultation. BOR and NMFS have also failed to initiate and/or complete consultation pursuant
4 to the MSFCMA.

5 62. On May 17, 2016, counsel for the Hoopa Valley Tribe notified the Secretary of
6 the Interior, the Secretary of Commerce, and officials of the BOR and NMFS of the agencies'
7 violations of the ESA through their failure to reinitiate consultation. *See* Exhibit 3.

8 63. The Hoopa Valley Tribe's May 17, 2016 letter also noted that the 2014 pre-spawn
9 mortality of adult Coho salmon returning to the Trinity River approached 50%, which is the
10 highest ever observed and approximately four times the average pre-spawn mortality recorded in
11 1997 – 2013. Such unprecedented mortality was not anticipated or analyzed in the 2013 BiOp,
12 and such new information should have required re-initiation of formal consultation.

13 F. SONCC Coho Face Imminent and Irreparable Harm From Project Operations

14 64. Coho salmon, including ESA-listed SONCC Coho, generally exhibit a three-year
15 life cycle. Coho eggs typically hatch in March, emerge two weeks after hatching as "fry", and
16 generally spend up to 15 months in freshwater using the mainstem Klamath to rear and
17 redistribute. Fry generally become smolts after 15 months and migrate to the Pacific Ocean
18 primarily between March and June. Water quantity and water quality are especially significant
19 to the juvenile migration out of the Klamath River system. The spring months of March through
20 June represent the peak of juvenile coho presence in the mainstem Klamath River and are critical
21 months in which to provide adequate water in the mainstem Klamath River. Flows provided out
22 of Iron Gate Dam contribute significant and often the majority of instream flows that are utilized
23 by fish in the mainstem Klamath River between Iron Gate Dam and the confluence with the
24 Trinity River.

25 65. Fish disease, in this case caused by a spore forming parasite known as *C. shasta*,
26 is a significant factor limiting the survival and recovery of SONCC Coho in the mainstem

1 Klamath River. Operation of the Klamath Project by BOR exacerbates the impact and severity
2 of the lethal fish disease caused by *C. shasta*. This is due to the reduction in magnitude and
3 changes in timing, frequency and duration of flows relative to pre-project hydrology in the
4 mainstem Klamath River in the fall, winter, and spring periods, which favors the parasite's
5 alternate host (*Manayunkia speciosa* polychaete worm) and transmission of infectious *C. shasta*
6 actinospores to fish.

7 66. Effective management of *C. shasta* life cycle requires a flow regime that targets
8 the multiple facets of the parasite hosts and spore transmission periods throughout the year.
9 There is a strong correlation between increased fish infection rates/severity and low flows in the
10 river downstream of Iron Gate Dam and conversely there is a strong correlation between
11 decreased infection rates/severity and increased flows.

12 67. Critical flushing and geomorphic flows in the fall, winter, and early spring have
13 been significantly reduced in magnitude and duration due to Klamath Project activities, creating
14 stable ecological conditions that favor the polychaete worms that host the parasite stage that
15 produces fish killing actinospores and such stable conditions also increase the infection
16 prevalence of those worms with *C. shasta* parasites. Increased numbers and infection prevalence
17 of disease host worms is associated with the increased prevalence of actinospores and associated
18 infection rates of juvenile fish. Higher peak flows increase disease host scour and relocation,
19 reducing host densities and infection rates.

20 68. Critical actinospore dilution and disruption flows in the spring period have been
21 significantly reduced due to Klamath Project activities. The concentration of actinospores in the
22 Klamath River is a function of the number of spores and the volume of water into which they are
23 discharged. The effective dilution capacity of the river is increased with increasing flows.
24 Infection is a function of exposure duration and spore concentration (modified with velocity and
25 temperature), therefore flow dilution can reduce infection. Actinospore concentration is the most
26 important variable for fish infectivity and mortality. Increased flows also increase water velocity,

1 which has the potential to reduce transmission of actinospores to fish depending on the
2 velocities. Increased flows also have the potential to lower water temperatures or slow warming
3 of the river. Specific elevated discharge events have the ability to dilute spores and reduce
4 infectivity rates.

5 69. This correlation of flow and infection rates is supported by the observation of
6 reduced disease infection and mortality estimates in wetter years with higher flows and vice
7 versa. For example, between 2006 and 2015, the two years with the highest disease levels were
8 2014 (81% via QPCR), and 2015 (91% via QPCR). The peak flow release magnitude and
9 duration during those years was minimal and releases from Iron Gate Dam during the primary
10 juvenile coho outmigration season (April through June) were in large part equivalent to the
11 minimum flows prescribed by the 2013 Biological Opinion.

12 70. Prior to implementation of the 2013 BiOp flows in 2014 and 2015, there was no
13 other year in that period of record in which the infection rate exceeded 49% via QPCR.

14 71. The 2013 Biological Opinion sets a maximum disease threshold of 49% as
15 measured by QPCR. In 2008, data reported a 49% infection rate via QPCR. However, flows at
16 Iron Gate Dam in 2008 (which resulted in a 49% infection rate, which is equivalent to the
17 maximum allowable infection rate in the 2013 BiOp) were significantly higher than the
18 minimum flows prescribed in the 2013 BiOp. For example, from April 1 to May 1, 2008, flows
19 at Iron Gate Dam were approximately 3,000 cfs, dropping to approximately 2,000 cfs by June 1,
20 2008. The 2013 BiOp minimum flows for April, May, and June are 1,325 cfs, 1,175 cfs, and
21 1,025 cfs respectively. In 2008, flows during April, May, and June were much higher than the
22 minimum flows in the 2013 BiOp for those same months. This suggests that much higher flows
23 than those prescribed in the 2013 BiOp are necessary in order to limit infection rates to below the
24 current target of 49%.

25 72. Peak winter flows, not currently part of the 2013 Klamath Operations and
26 Biological Opinion, are correlated with reductions in disease host (polychaete) population

1 density and prevalence of infection. For example, a peak flow event in 2006 of 12,400 cfs
2 resulted in maximum prevalence of infection of polychaetes of 0.17-0.35% in populations
3 sampled, whereas moderate peak events (4,380 cfs in 2004; 5,700 cfs in 2011) corresponded to a
4 higher maximum prevalence of infection of 4.96% and 5.38% respectively, and preliminary data
5 suggests that even lower peak flows (1,890 cfs in 2014; 3,580 cfs in 2015) resulted in the highest
6 ever measured infection rates in polychaete worms of approximately 10%. This suggests that
7 higher peak flows during periods between November and June are needed to reduce disease hosts
8 and associated host disease prevalence in conjunction with increased dilution flows in the spring,
9 all of which would reduce the most critical variable for fish health: actinospore concentration.

10 73. Between 2006 and 2015, there were five years in which infection rates as
11 measured by QPCR were well below 49%. Those years were 2006 (34%), 2007 (31%), 2010
12 (17%), 2011 (17%), and 2012 (30%). Flows during 2012, the year with the median level of
13 disease in those five years with lower disease levels, were higher than 2008 and significantly
14 higher than the minimum flows prescribed in the 2013 BiOp with flows approaching
15 approximately 4,000 cfs in mid and late April of 2012. In 2012, flows during April, May, and
16 June were much higher than the minimum flows in the 2013 BiOp for those same months. This
17 provides additional evidence that much higher flows than those prescribed in the 2013 BiOp are
18 necessary to limit infection rates to acceptable levels.

19 74. Flows at Iron Gate Dam in March 2016 were also significantly higher than
20 average, flows in April and May 2016 were significantly higher than the 2013 BiOp minimum
21 flows and flows in June 2016 were somewhat higher than the 2013 BiOp minimum flows. A
22 March 2016 controlled spill event, which was for dam safety purposes, resulted in significant
23 reductions in polychaetes within sampled areas of the infectious zone, which likely contributed
24 to reduced disease levels in 2016 as did higher spring flows. This is consistent with the analysis
25 that incorporating peak flows and sustained increased spring flows above those prescribed by the
26 2013 BiOp are necessary to reduce disease infection rates to acceptable levels.

1 75. The above data demonstrates the significant relationship between flows and
2 infection rates and further demonstrates the insufficient protection offered by the minimum flow
3 regime in the 2013 BiOp. Flows equivalent to the minimum flow regime in the 2013 BiOp
4 occurred in 2014 and 2015 resulting in the highest disease levels ever observed among juvenile
5 fish (81% and 91% respectively), well above the 49% current upper limit. Existing information
6 shows that operation of the Klamath Project pursuant to the minimum BiOp flows will produce
7 an impermissible level of disease infection (in excess of 50%) and could jeopardize the further
8 existence of ESA-listed species and tribally important fisheries.

9 76. The significant take exceedances resulting from disease infection rates in 2014
10 and 2015 plainly show that the 2013 BiOp, including its minimum flow regime and authorized
11 levels of disease infection, must be revisited for the adequate protection of SONCC Coho.

12 77. BOR's operation of the Klamath Project, and its Project supply diversions of up to
13 390,000 acre-feet of water per year from the Klamath River, is a primary cause of low flow
14 conditions in the mainstem Klamath River below Iron Gate Dam and is within BOR's
15 operational authority to remedy through the increase of flow levels at Iron Gate Dam.

16 78. In April 2015, BOR's Annual Operations Plan for the Klamath Project estimated
17 Project Supply for 2015 at 254,000 acre-feet. In April 2014, BOR's Annual Operations Plan for
18 2014 estimated Project Supply for March 1, 2014 through September 30, 2014 at 239,000 acre-
19 feet. The Environmental Water Account for both 2014 and 2015 was estimated at the minimum
20 level allowed by the 2013 BiOp of 320,000 acre-feet.

21 79. If BOR is allowed to continue operating the Klamath Project during the
22 upcoming juvenile outmigration season pursuant to the minimum flow regime in the 2013 BiOp,
23 the data and evidence shows that SONCC Coho will again suffer from disease infection rates
24 beyond those considered acceptable in the 2013 BiOp, will be taken at rates in excess of those
25 permitted in the current Incidental Take Statement, and that such operations with associated
26

1 levels of excessive take and adverse habitat modifications could jeopardize the survival or
2 recovery of SONCC Coho.

3 80. Establishment of an increased flow regime in advance of the Spring 2017 juvenile
4 outmigration is necessary to ensure protection of the fish during their upcoming outmigration.

5
6 **CLAIMS FOR RELIEF**

7
8 **FIRST CLAIM FOR RELIEF**

9 **Failure to Re-Initiate Formal Consultation Under Section 7 of the ESA, 50 CFR**
10 **§ 402.14(i)(4), 50 CFR § 402.16, and the APA.**

11 81. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth
12 in this Complaint.

13 82. NMFS violated § 7 of the ESA, 16 U.S.C. § 1536, 50 C.F.R. § 402.16, and the
14 APA, 5 U.S.C. § 706 by issuing an incidental take statement but failing to reinitiate formal
15 consultation when the take permitted by the ITS was greatly exceeded in 2014 and 2015.

16 83. BOR violated § 7 of the ESA, 16 U.S.C. § 1536, 50 C.F.R. § 402.14(i)(4) and 50
17 C.F.R. § 402.16 by failing to reinitiate formal consultation when the take permitted by the ITS
18 was greatly exceeded in 2014 and 2015.

19 84. Both NMFS and BOR also have a duty to re-initiate formal consultation due to
20 the occurrence of unanticipated pre-spawn mortality conditions that were not considered in the
21 2013 BiOp and which constitute new information pursuant to 50 CFR § 402.16.

22 85. BOR and NMFS' failure to re-initiate formal consultation failed to comply with
23 the express terms of the 2013 BiOp and ITS.

24 86. BOR and NMFS' failure to re-initiate formal consultation failed to comply with
25 regulations regarding re-initiation of consultation. 50 CFR §§ 402.14(i)(4); 50 CFR 402.16.

1 87. BOR and NMFS' failure to comply with the ESA and its implementing
2 regulations is directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

3 88. BOR and NMFS' actions and omissions, specifically including their failure to
4 reinitiate formal consultation described herein, are arbitrary, capricious, an abuse of discretion,
5 and otherwise not in accordance with the law and are reviewable in this Court under the APA, 5
6 U.S.C. §§ 704, 706.

7 89. Failure to re-initiate consultation and BOR's continued operation of the Klamath
8 Project under the 2013 BiOp and ITS has harmed, is irreparably harming, and will continue to
9 irreparably harm Plaintiff and Plaintiff has no adequate remedy at law.

10 **SECOND CLAIM FOR RELIEF**

11 **Violation of Duties to Insure Against Jeopardy Under Section 7 of the ESA by BOR**

12 90. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth
13 in this Complaint.

14 91. By continuing to operate the Klamath Project pursuant to the 2013 BiOp and ITS
15 and without reinitiation of formal consultation under the ESA, BOR is violating its affirmative
16 duty to insure that "any action authorized, funded, or carried out by such agency . . . is not likely
17 to jeopardize the continued existence of any endangered species or threatened species," here,
18 SONCC Coho. 16 U.S.C. § 1536(a)(2).

19 92. By continuing to operate the Klamath Project pursuant to the 2013 BiOp and ITS
20 and without reinitiation of formal consultation under the ESA, BOR is violating its affirmative
21 duty to insure that "any action authorized, funded, or carried out by such agency . . . is not likely
22 to . . . result in the destruction or adverse modification of habitat of [SONCC Coho] which is
23 determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2).

24 93. By continuing to operate the Klamath Project pursuant to the 2013 BiOp and ITS
25 and without reinitiation of formal consultation under the ESA, BOR is violating its affirmative
26 duty to "not make any irreversible or irretrievable commitment of resources with respect to the

1 agency action which has the effect of foreclosing the formulation or implementation of any
2 reasonable and prudent alternative measures which would not violate [ESA Section 7(a)(2)].” 16
3 U.S.C. § 1536(d).

4 94. BOR’s failures to comply with the ESA and its implementing regulations are
5 directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

6 95. BOR’s actions and omissions are arbitrary, capricious, an abuse of discretion, and
7 otherwise not in accordance with the law and are reviewable in this Court under the APA, 5
8 U.S.C. §§ 704, 706.

9 96. BOR’s continued operation of the Klamath Project in a manner that fails to insure
10 against jeopardy of the SONCC Coho or unlawful habitat modification has harmed, is irreparably
11 harming, and will continue to irreparably harm Plaintiff and Plaintiff has no adequate remedy at
12 law.

13 **THIRD CLAIM FOR RELIEF**

14 **Violation of Take Prohibitions in Section 9 of the ESA By BOR and NMFS.**

15 97. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth
16 in this Complaint.

17 98. Section 9 of the ESA prohibits federal agencies from unauthorized take of
18 threatened and endangered species and prohibits NMFS from authorizing activities that cause the
19 unauthorized take of threatened and endangered species.

20 99. The terms and conditions of the ITS regarding incidence of disease were exceeded
21 in 2014 and 2015, rendering the 2013 BiOp and ITS invalid.

22 100. NMFS is violating the ESA by continuing to allow Klamath Project operations
23 that result in excessive take of SONCC Coho pursuant to the terms of the fundamentally flawed
24 assumptions in the 2013 BiOp and ITS.

25 101. BOR’s operations of the Klamath Project have exceeded take authorizations in the
26 ITS, and will continue to exceed take authorizations in the ITS, in violation of the ESA.

1 102. The continued take of juvenile SONCC Coho is likely to occur, particularly in
2 low flow years.

3 103. NMFS' and BOR's failures to comply with the ESA and its implementing
4 regulations are directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

5 104. NMFS' and BOR's actions and omissions are arbitrary, capricious, an abuse of
6 discretion, and otherwise not in accordance with the law and are reviewable in this Court under
7 the APA, 5 U.S.C. §§ 704, 706.

8 105. Continuing and future unauthorized and unlawful take of SONCC Coho causes
9 irreparable harm to Plaintiff and Plaintiff has no adequate remedy at law.

10 **FOURTH CLAIM FOR RELIEF**

11 **Violation of MSFCMA and APA by BOR and NMFS for Failure to Consult on Essential**

12 **Fish Habitat**

13 106. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth
14 in this Complaint.

15 107. BOR has violated the MSFCMA, 16 U.S.C. § 1855(b)(2) for failing to consult
16 with the Secretary with respect to the Klamath Project's effects on Essential Fish Habitat.

17 108. NMFS has violated the MSFCMA, 16 U.S.C. § 1855(b)(4)(A) by failing to
18 consult on effects of the Klamath Project on Essential Fish Habitat.

19 109. BOR and NMFS' actions and omissions are arbitrary, capricious, an abuse of
20 discretion, and otherwise not in accordance with the law and are reviewable in this Court under
21 the APA, 5 U.S.C. §§ 704, 706.

22 110. BOR and NMFS' failure to consult has harmed, is irreparably harming, and will
23 continue to irreparably harm Plaintiff due to continuing impacts to Essential Fish Habitat caused
24 by the Klamath Project and Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Tribe respectfully requests that this Court:

- A. Determine and declare that NMFS and BOR have violated ESA section 7 and its implementing regulations by failing and deciding not to re-initiate formal consultation on the Klamath Project’s impacts on SONCC Coho;
- B. Determine and declare that BOR’s operation of the Klamath Project has violated and will continue to violate ESA section 7 due to BOR’s failure to insure that such operations are not likely to jeopardize the continued existence of SONCC Coho or result in destruction or adverse modification of critical habitat;
- C. Determine and declare that BOR’s operation of the Klamath Project has violated and will continue to violate ESA section 9 due to unlawful and excessive taking of SONCC Coho;
- D. Determine and declare that NMFS and BOR have acted in a manner that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 704, 706;
- E. Declare that the analysis of the BiOp and the accompanying ITS are legally invalid;
- F. Order Defendants to reinitiate formal consultation and prepare a legally adequate BiOp for Klamath Project operations and any related actions that complies with the requirements of the ESA, on a schedule to be set by the Court;
- G. Order BOR to limit irrigation water deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that will protect anadromous fish in accordance with the best available science and ESA requirements pending Defendants’ full compliance with their obligations under the ESA and with their trust obligation to protect the Tribe’s fishing rights;

- 1 H. Grant such restraining orders and/or preliminary and permanent injunctive relief
2 as the Tribe may from time to time request to ensure that the Klamath River
3 anadromous fishery does not continue to suffer irreparable harm pending
4 resolution of the merits of this action;
- 5 I. Determine and declare that BOR has violated the MSFCMA, 16 U.S.C.
6 § 1855(b)(2) and NMFS has violated the MSFCMA, 16 U.S.C. § 1855(b)(4)(A),
7 by failing to consult regarding the effects of the Klamath Project on Essential Fish
8 Habitat and ordering BOR and NMFS to initiate and complete such consultation;
- 9 J. Award the Tribe its reasonable fees, expenses, costs, and disbursements, including
10 attorneys' fees associated with this litigation under the citizen suit provision of the
11 ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C.
12 § 2412; and
- 13 K. Grant the Tribe such further and additional relief as the Court may deem just and
14 proper.

15 DATED this 1st day of December, 2016.

16
17 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

18 /s/ Thomas P. Schlosser

19 Thomas P. Schlosser WSBA #06276

20 Thane D. Somerville WSBA #31468

21 Attorneys for Plaintiff Hoopa Valley Tribe

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tds:12/1/16

EXHIBIT 1



United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Region
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365

IN REPLY REFER TO:

KO-300
ENV-7.00

JUL 17 2015

VIA ELECTRONIC MAIL AND U.S. MAIL

Ms. Lisa Van Atta
National Marine Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Subject: Notification of Modification, Amendment, Clarification and/or Reinitiation of Formal Consultation on Klamath Project Operations

Dear Ms. Lisa Van Atta:

The Bureau of Reclamation received the final integrated (non-jeopardy) Biological Opinion (BiOp), issued jointly by National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS); collectively (Services), on May 31, 2013, regarding the effects of the proposed continued operation of the Klamath Project (Project) from May 31, 2013, through March 31, 2023, on Federally listed threatened and endangered species and their designated critical habitat pursuant to section 7(a)(2) of the *Endangered Species Act of 1973*, as amended (16 U.S.C. 1531 et seq.).

During the time that Reclamation has been implementing the Proposed Action under the BiOp, unprecedented, multi-year drought conditions have persisted which have caused variations in operations and hydrologic conditions that were not anticipated at the time the Proposed Action was analyzed in the BiOp. Reclamation and the two Services have engaged in a series of discussions regarding these unanticipated conditions and have addressed some of them; and further suggested that the agencies engage in more comprehensive discussions to address the remaining issues once the current drought operations were complete. Reclamation would like to begin a comprehensive discussion to clearly establish a path forward to resolve the outstanding issues.

One of these outstanding issues is completion of the Essential Fish Habitat and Orca consultation. To date, additional modeling tools that would aid in this analysis are not complete and the data gap still exists. Therefore, we would also like to engage in discussions regarding options for completing these two actions.

Reclamation appreciates and acknowledges the extensive inter-agency coordination and collaboration during the formal consultation process leading to the 2013 BiOp. Reclamation looks forward to continued collaborative coordination as we develop the strategy and approach to move into this new phase.

I would like to suggest a meeting date of August 4, 2015, for the three agencies to meet to discuss the issues listed above. In the interim, should you have any questions regarding the BiOp or the contract for the modeling tool, please contact Ms. Kristen Hiatt, Natural Resource Specialist at 541-883-6935 or at khiatt@usbr.gov.

Sincerely,



Therese O'Rourke Bradford
Area Manager

cc: United States Fish and Wildlife
Attn: Laurie Sada, Field Supervisor,

Mr. Jim Simondet
National Marine Fisheries Service
1655 Heindon Road
Arcata, CA 95521

EXHIBIT 2



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

West Coast Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

MAR 29 2016

In response refer to:
151422WCR2013AR00274

Therese O'Rourke Bradford
Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603-9365

Re: Klamath Project Operations Biological Opinion

Dear Ms. O'Rourke Bradford:

Thank you for your July 17, 2015, letter to NOAA's National Marine Fisheries Service (NMFS), regarding "Notification of Modification, Amendment, Clarification and/or Reinitiation of Formal Consultation on Klamath Project Operations" (Project Operations), which relates to the *Biological Opinions on the Effects of Proposed Klamath Project Operations from May 31, 2013 through March 31, 2023, on Five Federally Listed Threatened and Endangered Species* (2013 BiOp), issued May 31, 2013, by NMFS and the U.S. Fish and Wildlife Service. In response to your letter, we determined that Chinook salmon *Ceratanova shasta* (*C. shasta*) infection rates used in the Incidental Take Statement (ITS) of the 2013 BiOp as a surrogate for the extent of incidental take of listed Southern Oregon/Northern California Coast Evolutionarily Significant Unit coho salmon from increased disease risk, were exceeded in 2014 and 2015. We conclude that the effects analysis and conclusions in the 2013 BiOp remain valid. However, based on new information described below, we intend to revise the ITS prior to the 2017 operational water year, commencing April, 1, 2017.

In the 2013 BiOp, NMFS concluded that the proposed action would likely result in lower disease risks from *C. shasta* infection in juvenile coho salmon than observed during the hydrologic analysis period of record (POR), 1981-2011. NMFS came to this conclusion after considering, among other things: 1) our expectation that reductions in spring Klamath River flow due to Klamath Project Operations are likely to increase water temperatures in the spring by up to approximately 0.5 °C, and 2) when water temperature chronically exceeds 16.5 °C coho salmon may become stressed and more susceptible to disease-related mortality. NMFS also noted that during consecutive dry years, the proposed action would likely result in increased fine sediment deposition, increased establishment of aquatic vegetation downstream of Iron Gate Dam, and decreased dilution of *C. shasta* actinospores in the spring; all factors that create favorable conditions for infecting coho salmon with *C. shasta*.



During dry water years, the daily minimum flows in April, May, and June included in the proposed action provide at least 1325 cubic feet per second (cfs), 1175 cfs, and 1025 cfs, respectively for diluting *C. shasta* actinospores. While these minimum flows are not likely sufficient to dilute actinospore concentrations to below 5 genotype II spores/Liter, which will likely result in disease related mortality to coho salmon in the mainstem Klamath River, the 2013 BiOp states that these minimum flows provide a limit to the increased risks posed to coho salmon under the proposed action.

A relative scarcity of juvenile coho salmon infection information existed for NMFS to evaluate Project operations effects in our 2013 BiOp. In contrast, systematic monitoring of juvenile Chinook salmon *C. shasta* infection rates has taken place since 2006. Therefore, in the ITS of our 2013 BiOp, NMFS utilized Chinook salmon infection rate estimates as a surrogate to estimate the extent of incidental take of coho salmon from increased disease risk. In the 2006-2012 disease monitoring POR, the maximum annual average May through July infection rate estimate for the Iron Gate Dam to Trinity River confluence reach of the Klamath River was 49 percent (via quantitative polymerase chain reaction). This highest average annual Chinook salmon *C. shasta* infection rate was used as a surrogate to describe the expected maximum coho salmon infection rate during implementation of the proposed action through 2023. In 2014, the average Chinook infection rate in the Shasta to Trinity River reach from May through July was estimated at 81 percent. In 2015, an estimated 91 percent of juvenile Chinook salmon were infected with *C. shasta*. Therefore, the Chinook salmon *C. shasta* infection rates used in the ITS of the 2013 BiOp as a surrogate for the extent of incidental take of listed coho salmon from increased disease risk were exceeded in 2014 and 2015.

As stated in your letter, multi-year persistent drought conditions contributed to substantial challenges for Project Operations in 2014 and 2015. For example, the lack of snowpack in 2014 and 2015 resulted in near record low inflows to Upper Klamath Lake. Iron Gate Dam releases consistent with the 2013 BiOp, combined with record low spring and summer accretions to the mainstem Klamath River, resulted in deleterious conditions for listed coho salmon in the Klamath River. Although the extent of dry hydrologic and associated environmental conditions in the Klamath River in 2014 and 2015 are rare, the analysis in the 2013 BiOp fully considered the expectation that disease infection rates would generally be higher in dry years, and NMFS expected that environmental conditions during consecutive dry years would be particularly poor and associated disease risks would be higher. Therefore, the effects analysis and conclusions of the 2013 BiOp remain valid.

We now know that the surrogate we used in the ITS of the 2013 BiOp for the extent of incidental take of listed coho salmon from increased disease risk did not fully consider the environmental variability that coho salmon experienced in the Klamath River in 2014 and 2015. In addition, we are aware that the *C. shasta* disease monitoring results for a revised, long-term POR will be reassessed utilizing weekly juvenile Chinook salmon population estimates to better describe the effects of *C. shasta* on the Klamath River Chinook population. Furthermore, the Stream Salmonid Simulator (S3) model will soon allow for evaluation of *C. Shasta* infection rates under various flow management scenarios. We will revise the ITS based on consideration of the environmental variability that coho salmon experienced in the Klamath River in 2014 and 2015 and to account for the likelihood of similar conditions in the future. We expect that the new *C. shasta* monitoring results analysis and the S3 will be completed within the next few months and

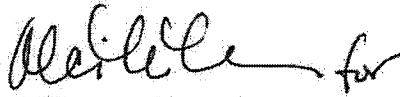
then we will need to consider the appropriate description of the extent of incidental take of coho salmon based on that information. Therefore, we will revise the amount and extent of incidental take of listed coho salmon from increased disease risk in the ITS of the 2013 BiOp prior to the 2017 operational water year, commencing April 1, 2017.

In contrast to water years 2014 and 2015, NMFS expects that hydrologic conditions in water year 2016 will be within the bounds of the environmental variability that we considered in developing the surrogate for the ITS of the 2013 BiOp; as of March 28, 2016 the Klamath Basin was at 114 percent of average annual peak snow water equivalent. We conclude that given the extensive snowpack, flows and water temperatures in the Klamath River below Iron Gate Dam in the Spring of 2016 are expected to be sufficient to reduce disease infection rates below the take exceedance criteria described in the ITS. We do not anticipate dry hydrologic conditions, and the resultant level of effects of the Project operations observed during dry year conditions, will occur in 2016 during the time needed to revise the ITS as described above.

Your letter also mentioned the outstanding issues of completing the Essential Fish Habitat and Southern Resident killer whale consultations, and it provided that additional modeling tools that would aid in these analyses were not yet complete. The *C. shasta* monitoring results analysis and the S3 model will soon be complete. Please contact Jim Simondet, whose contact information is provided below, as soon as possible in order to develop a schedule for completing these consultations.

NMFS appreciates the close coordination with your staff during these challenging operational and hydrologic circumstances. If you have any questions regarding the 2013 BiOp or ESA section 7 consultation, please contact our Klamath Branch Chief, Mr. Jim Simondet at 707 825-5171.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Stelle, Jr.", followed by a small flourish.

William W. Stelle, Jr.
Regional Administrator

EXHIBIT 3

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May 17, 2016

The Honorable Sally Jewell
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The Honorable Penny Pritzker
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United States Department of Commerce
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Eileen Sobeck, Assistant Administrator
National Marine Fisheries Service
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Silver Spring, MD 20910

Re: Notice of Violations of the Endangered Species Act

Dear Secretary Jewell, Commissioner López, Regional Director Murillo, Secretary Pritzker, and Assistant Administrator Sobeck:

This letter provides notice that the Bureau of Reclamation ("Reclamation") and the National Marine Fisheries Service ("NMFS") are in violation of the Endangered Species Act ("ESA"). The violations arise from Reclamation's operations in the Trinity and Klamath River jeopardizing the ESA listed Coho salmon and from Reclamation's and NMFS' failure to reinitiate formal consultation on the Klamath Biological Opinion (BiOp) as required by ESA Section 7. Meanwhile, reliance upon Trinity River Division water to address fishery habitat in lower Klamath River has led to legal actions brought against DOI by Central Valley irrigators *E.g., San Luis & Delta Mendota Water Authority v. Jewell*, No. 15-cv-1290 (E.D. CA). This notice is pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g). This notice provides Reclamation and NMFS "an opportunity to review their actions and take corrective measures...." *Sw. Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998).

This notice is sent on behalf of the Hoopa Valley Tribe. The Hoopa Valley Tribe, a sovereign federally-recognized Indian tribe, is located on the Hoopa Valley Reservation, which was set aside and reserved as a permanent homeland for the Tribe by the United States in 1864. The lower twelve miles of the Trinity River, as well as a stretch of the Klamath River near the confluence with the Trinity River flow through the Hoopa Valley Reservation. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe and other Klamath Basin tribes. When the Hoopa Valley Reservation was created, the fishery was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). Today, the salmon fishery holds significant cultural, commercial, and economic value for the Tribe. The Tribe holds federally-reserved fishing rights in the Klamath and Trinity Rivers, and a federal reserved water right to support the fishery. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *United States v. Adair*, 723 F.2d 1394, 1411 (1984). Adverse impacts to the ESA listed Coho fishery that result from Reclamation’s and NMFS’ actions directly impair and injure the Tribe and its sovereign, legal, economic, and cultural interests.

Section 7 of the ESA imposes an obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined... to be critical...” 16 U.S.C. § 1536(a)(2); see 50 C.F.R. § 402.01(a); *Pyramid Lake Paiute Tribe of Indians v. United States Dep’t of Navy*, 898 F.2d 1410, 1414-15 (9th Cir. 1990). An action jeopardizes the continued existence of a listed species when it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Destruction or adverse modification of habit occurs where there is a “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” *Id.*

Agencies must consult with either Fish and Wildlife Service or NMFS “under Section 7 of the ESA for any discretionary agency action that ‘may affect’ a listed species or designated critical habitat.” *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012); see 50 C.F.R. § 402.14(a). The Ninth Circuit has found that “‘may affect’ is a ‘relatively low’ threshold for triggering consultation.” *Id.* (quoting *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)).

After a biological opinion is issued, federal agencies have a continuing duty under Section 7 of the ESA to insure their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. An agency must reinitiate consultation under Section 7 when:

- (a) discretionary federal involvement or control has been retained or authorized;
- and (b) *the amount or extent of taking specified is exceeded, new information*

reveals effects that may affect listed species or critical habitat in a manner not considered, the action is subsequently modified so as to cause an effect to the listed species or critical habitat not previously considered, or a new species is listed or critical habitat designated.

Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1229 (9th Cir. 2008) (emphasis added); 50 C.F.R. § 402.16(a)-(d).

The Klamath Project reduces the magnitude, frequency, and duration of mainstem Klamath River flows, contributing to reduced survival and production of ESA listed Coho salmon that evolved under a natural flow regime. A major limiting factor for Coho salmon is the high incidence of disease, which is directly attributed to Klamath Project activities. The densities and infectivity rates of *Ceratomyxa nova* (*C. nova*, formerly *C. shasta*) on juvenile Coho are influenced in large part by spring and winter flows, both of which provide important ecological function in reducing disease prevalence by scouring parasite hosts, diluting spores infectious to salmon, and increasing transport rate of outmigrating juvenile Coho salmon. Reclamation's and NMFS' failure to adequately address disease spore density through providing adequate and sufficiently mitigating spring flows in the Klamath River and their failure to reinitiate consultation as required by Section 7 of the ESA has negatively affected Coho salmon returning to the Klamath and Trinity rivers. These salmon are part of the Southern Oregon/Northern California Coast ("SONCC") evolutionarily significant unit ("ESU"). SONCC Coho are listed as threatened with extinction under the ESA, and critical habitat for the SONCC Coho ESU includes all accessible waters of the Klamath River, the Trinity River, and the tributaries of the Klamath and Trinity rivers.

After completing formal consultation with Reclamation, NMFS issued its Klamath Project BiOp on May 31, 2013. In the BiOp, NMFS outlined the extensive impacts of [sic] *Ceratomyxa shasta* ("*C. Shasta*"), a lethal parasite, on SONCC Coho and developed an Incidental Take Statement (ITS). The ITS allowed up to a 49 percent (via quantitative polymerase chain reaction) infection rate of the total Chinook salmon juveniles in the mainstem Klamath River between the Shasta River and the Trinity River.¹ In 2014 and 2015, the infection rates were 81 percent and 91 percent respectively (True, et al., 2015, 2016). Thus, the disease infection rates plainly exceeded the rates allowed in the ITS. Reclamation and NMFS must ensure that this high infection rate does not jeopardize the continued existence of the SONCC Coho.

On March 29, 2016, NMFS responded to Reclamation's July 17, 2015 letter regarding "Notification of Modification, Amendment, Clarification and/or Re-initiation of Formal Consultation on Klamath Project Operations." In its letter, NMFS explained that the *C. Shasta* disease incidence exceeded the ITS in 2014 and 2015. Yet, NMFS dismissed the need to reinitiate consultation because "the analysis in the 2013 BiOp fully considered the expectation

¹ Given the low numbers of juvenile Coho salmon in the Klamath River, NMFS used Chinook salmon disease incidence as a proxy for Coho in the ITS.

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that disease infection rates would generally be higher in dry years, and NMFS expected that environmental conditions during consecutive dry years would be particularly poor and associated disease risks would be higher.” NMFS’ attempt to dismiss Reclamation’s obligation to reinitiate consultation when the taking exceeds the ITS violates Section 7 of the ESA and 50 C.F.R. § 402.16(a).

Despite multiple requests by the Hoopa Valley Tribe since 2014 and other tribal and federal participants in the Federal Flow Account Scheduling Environmental Team (FASTA) to increase flows to reduce disease incidence given past, existing, and impending take exceedances during critical spring months, Reclamation has refused to modify flows with NMFS’ tacit or explicit approval. NMFS even proposed increasing the amount of take allowed in the BiOp through an amendment rather than reinitiating consultation and addressing the root of the problem through increased spring flows.

In addition, the 2014 pre-spawn mortality of adult Coho salmon returning to the Trinity River approached 50 percent, which is the highest ever observed and approximately four times the average pre-spawn mortality recorded (1997-2013). This unprecedented pre-spawn mortality rate—likely resulting from poor flow and stressful conditions in the lower Klamath—was not anticipated nor analyzed in the 2013 BiOp. Indeed, the BiOp incorrectly concluded that the Klamath Project was unlikely to impact adult Coho salmon. Thus, new information demonstrates that the Klamath Project may affect adult Coho and/or Coho habitat in a manner not previously considered, which requires re-initiation of consultation.

Reclamation cannot restore the juvenile Coho salmon lost to *C. nova* in 2014 and 2015; nor can Reclamation restore the unprecedented number of Trinity River adult Coho killed before spawning in 2014. However, Reclamation can take action to increase the flows in Klamath River to reduce the incidence of *C. nova* infection among out-migrating juveniles in the spring and early summer, and reduce the mortality rate among pre-spawn adult Coho salmon in the fall. We urge Reclamation and NMFS to stop violating Section 7 of the ESA by simply modifying the existing ITS to accommodate new information and instead reinitiate consultation to provide increased flows in the Klamath River.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



Thomas P. Schlosser

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True, K., Voss, A., & Foott, J. Scott (2016). Myxosporean Parasite (*Ceratonova shasta* and *Parvicapsula minibicornis*) Prevalence of Infection in Klamath River Basin Juvenile Chinook Salmon, April - July 2015. U.S. Fish & Wildlife Service California – Nevada Fish Health Center, Anderson, CA. <http://www.fws.gov/canvfhc/reports.asp>.

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